69-1901-8180-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

John B. Lennes, Jr., Commissioner,
Department of Labor and Industry,
State of Minnesota,

Complainant,

vs.

International Bildrite, Inc., and
Dale Krueger, Norman Groze, and
Albert Tureene, Individually,

Respondents.

CORRECTED FINDINGS
OF FACT, CONCLUSIONS
OF LAW AND ORDER

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on November 2 and 3, 1993, in the Koochiching County Courthouse, International Falls, Minnesota.

Joan D. Humes, Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155-4199, appeared on behalf of Complainant. Thomas F. Andrew, Brown Andrew Hallenbeck Signorelli & Zallar, P.A., 300 Alworth Building, Duluth, Minnesota 55802, appeared on behalf of Respondents. The record closed in this matter on December 2, 1993, upon receipt of the post-hearing briefs.

NOTICE

Pursuant to Minn. Stat. 182.669, subd. 1, this Order is the final agency decision in this case. Persons aggrieved by this decision may seek judicial review pursuant to Minn. Stat. 14.63 through 14.69.

ISSUE

The primary issue in this case is whether an employee's refusal to relight an industrial kiln as instructed by his immediate superior was based upon a reasonable belief by the employee that the conditions presented an imminent danger of death or serious physical harm to himself.

Based upon the record herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. International Bildrite, Inc. (Bildrite) manufactures fiberboard in its plant in International Falls, Minnesota. Construction of the plant began in 1986 and production began in 1987. The fiberboard is generally used in construction for roofing and siding sheathing.

2. The process of making fiberboard starts with mixing or beating wood particles, other substances and chemicals in a large vat of water. The slurry mix is refined and moved to the "forming machine." There two large drums of a screen-type material rotate horizontally in the mixture, picking it up on their surfaces and draining much of the moisture from it. The material is then removed from near the top of the rotating drums in long continuous strips, several feet wide. The material is then passed through rollers where it is pressed together and more of the moisture squeezed out. The product is then cut into sheets 8 to 12 feet long and fed into the kiln. The forming machine is located at what is known as the "wet end" of the kiln. The fiberboard takes about three hours to travel through the kiln and emerge at the "dry end" where it is cut into appropriate size sheets and moved on for bundling and shipping to Bildrite's customers.

3. The kiln is a large oven used to dry the fiberboard. The large fiberboard sheets, perhaps as large as 12 by 12, move through the kiln on steel rollers, which are referred to as "rolls.". There are ten levels of rolls and therefore ten layers of sheets are moving through the kiln at any one time. The rolls are turned by chain-driven sprockets located on the "back side" of the kiln.

4. The kiln is quite long, perhaps 150 feet or so, based upon the ALJ's observation and recollection. It is perhaps 16 feet wide and 16 feet high. The sides of the kiln are composed of large doors several feet wide. Inspection windows are located at various points along the sides. The top of the kiln is constructed of lay-in panels.

5. The kiln is divided into three zones, each of which has its own burner and burner controls. The burners are located on the roof of the building above each of the zones. The ceiling of the building, the underside of the roof, is perhaps 20 feet above the kiln. The burners are large horizontal tubes fired by natural gas. The heated combustion air itself is forced down

through large ducts to the beginning of each zone, drawn through the zone by fans and then drawn back up to the roof at the end of the zone. Some of the exhaust air is fed back into the burner, but additional air for combustion, more rich in the oxygen necessary for combustion, is drawn into the burner through the roof from the area above the kiln. Using the air above the kiln also helps in the removal of air from above the kiln which is often laden with fibers and saw dust.

6. The kiln at Bildrite was purchased from Boise Cascade Company. Boise had made fiberboard at its "Insulite" plant for many years prior to shutting down in 1984. The Bildrite kiln was one of four operated by Boise at Insulite and had been completely remodelled in 1982. Several of Bildrite's employees had worked previously on the fiberboard kilns at the Insulite plant, some for more than thirty years.

7. A production crew at Bildrite consists of seven employees, including the team leader. Four production crews work three shifts around the clock. There is one kiln inspector on each crew whose responsibility is to monitor the operation of the kiln. This includes lighting the burners, monitoring the temperatures in the kiln and, very importantly, watching for fires in the kiln, trying to prevent fires, putting out small fires as they occur and fighting larger fires that occur.

8. Each of the burners at the Bildrite plant is controlled by a Honeywell BC 7000 micro computer burner control system known as the "Blue Chip" system. The system controls the start up and operation of its burner. It monitors various sensors and detectors and will shut down the burner if certain conditions are detected. The start up cycle for each burner requires that the air in the burner and kiln be purged to ensure that there is no unburned natural gas in it. This requires the opening and closing of some panels on the kiln. When that is completed, the blue chip system allows the pilot light to be ignited and if the pilot ignites, it allows the gas to flow to the main burner where it is ignited by the pilot light.

9. Each burner has a gas valve that controls the flow of natural gas to the pilot light. Opening of the valve is supposed to activate a switch indicating that the valve is open. On and prior to April 28, 1992, the valve on Zone 1 did not do so because the valve was not properly calibrated. Thus, the Blue Chip system would not ignite the pilot flame for the Zone 1 burner because it did not receive a signal that the gas valve was open. This defect required the kiln inspector to climb up on the top of Zone 1 and manually activate the switch. T. 260-261. Pushing the switch allowed the pilot flame to light, which it did while the kiln inspector was holding in the switch. When the pilot lit, a light would flash on the control panel for that zone, which was located on the floor perhaps 20 feet to the side of the kiln. The kiln inspector could observe the light flashing from his position on top of the kiln or someone near the control panel would tell him that the pilot had lit. At that point, the kiln inspector would climb down from on top of the kiln, go to the control panel and push the button to ignite the main burner. T. 244-245. The kiln inspectors were just trained to push the

switch and told that it would make the burner go to the next cycle. Most of them understood that it would allow the pilot flame to ignite and some had concerns for their personal safety about being on top of the kiln while starting up the burner. T. 242. There were other switches and sensors in the control systems that were bypassed or jumpered on a permanent or temporary basis that would allow the burners to operate when the Blue Chip system would otherwise have shut them down. One of those was the switch that indicated the position of one of the panels operated during the pre-ignition purge. The kiln inspectors had little understanding of such jumpers and had concerns about their effect on the safety of the kiln.

10. Because of the temperatures involved in the kiln, fires are a constant risk and common occurrence. As the fiberboard enters the wet end of the kiln, the moisture in the fiberboard being released into the kiln reduces the fire risk. As the fiberboard moves through the kiln and into the third zone, there is less moisture and the fire risk increases, not just in the fiberboard itself, but in the sawdust, fibers and other debris that accumulates in the kiln. The greatest likelihood of fire occurs when there are spaces between the fiberboard sheets or where no more sheets are being fed into the kiln. That reduces the moisture in that space and also alters the air flow so that the dust and debris are stirred up and more likely to ignite. The fire danger is also increased by leaks in the kiln, such as by open doors and doors that don't seal well, which disrupt the designed air flow characteristics of the kiln.

11. There are several methods for avoiding and fighting fires in the kiln. One of the kiln inspector's primary duties is to watch the interior of the kiln as the fiberboard is moving through it. It is not unusual to observe small fires in the debris in the kiln and the kiln inspector will usually extinguish those by opening a door or inspection window and spraying the fire with water from a fire hose. Reducing the heat and introducing moisture by spraying in water can reduce the fire danger where appropriate (but also defeats the purpose of the kiln.) There is an automatic sprinkler system inside the kiln with sprinkler heads that spray water when a certain temperature is reached. There is also a manually operated deluge system that allows the kiln inspector to spray water into selected zones of the kiln. Lastly, there is a floor sprinkler system that can be used by the kiln inspector. Generally, it was the responsibility of the kiln inspector to extinguish any fire. On very large fires, the kiln inspector is assisted by the team leader and other available persons. The local fire department is seldom called, apparently only if a fire spread to the building.

12. Rudolph Vergoth is a high school graduate and completed one year of college in 1974-75. From then until 1988 he worked at various jobs, none of which related to the manufacturer of fiberboard or any other manufacturing process. He went to work for Bildrite in July 1988.

13. Vergoth worked up through several positions at Bildrite. He started as a general laborer, worked as a trimmer and

trimmer's helper on the saws at the dry end of the kiln, worked in the yard filling the chip hopper and asphalt hopper, worked in the lab doing quality control and worked on the hydropulper and at the refiner. On June 14, 1991, Vergoth started working as a kiln inspector at $8.35 an hour.

14. Vergoth's training for the kiln inspector position consisted of a few days of training by another kiln inspector who demonstrated how to start the kiln and the other functions of the job. That was Bildrite's standard method of training kiln inspectors. There were no training manuals or other documents provided to new kiln inspectors. On October 29, 1991, Vergoth received an employee evaluation report from his supervisor. Ex. 1. It rated him an "8" on a scale of 1 to 10 in overall performance. The comments on the report indicated that Vergoth had good work habits, did good quality work, was very safety conscious, but needed some improvement on attitude and initiative.

15. Prior to being promoted from utility to kiln inspector in 1991, Vergoth had received some warnings for infractions at Bildrite. On August 20, 1989, he was warned for being insubordinate by leaving work at the end of his shift after being advised by his shift leader that his relief was not coming in and that he would have to work over. On August 29, 1989, he was suspended for three days for not reporting to work on Saturday, August 26, 1989, "after having voluntarily committed to working that day." Ex. B. In Vergoth's view, he had stated that he would be available if they wanted him, but no one ever told him that they wanted him. On October 18, 1989, he was warned about leaving his job area without permission, to visit and annoy the purchasing manager. On April 21, 1990, he was written up by his supervisor for not completing "beater reports."

16. Vergoth was quite safety conscious and quite vocal about things he saw as potential hazards. He was concerned as to why they had to go on top of the kiln to bypass the safety switch to ignite the pilot. When he was first trained in as a kiln inspector, he asked why that had to be done and the only explanation given was that the switch was jumpered because they couldn't get it to work right and that that was just the way it was. T. 43-44. He was concerned that the doors on the kiln did not seal very well and let air in, T. 46-47, that the asphalt used in some of the fiberboard was highly carcinogenic, T. 35, that the cloud of vapors rising from the hydropulper made driving of vehicles through that area dangerous, T. 37-38, that leaving gasoline-engine forklift trucks running built up unsafe gas fumes, T. 38, and that the Zone 1 burner had a very sloppy and inefficient flame, T. 38-40.

17. Vergoth was also a member of the union bargaining committee on rules, instructions and training. Vergoth was considered by Al Tureene, the Bildrite plant manager at the time, to be a "difficult" employee who spoke in a hostile manner much of the time. At one point during the negotiations, Vergoth had stated, "Hey, Tureene, how many more guys are you going to kill before we have to get something done here?" There had been a

serious accident at Bildrite in which an employee had been killed. Tureene Deposition 110-111.

18. On April 27, 1992, Vergoth worked the 3:00 p.m. to 11:00 p.m. shift at Bildrite. At 11:00 p.m., Vergoth was held over to work part of the following shift because the kiln inspector on the 11:00 p.m. to 7:00 a.m. shift was not able to come in. In that situation, it is the normal practice for the person working the prior shift to stay over an extra four hours and for the person working the subsequent shift to come in four hours early and relieve the person staying over.

19. Bildrite had been having a problem with some large water pumps that day. At 12:50 a.m. on April 28, 1992, it became necessary to shut down the forming machine. By that time, maintenance workers had been called in to work on the pumps. As the last of the board went through, Vergoth began shutting down the kiln. By about 3:00 a.m., the end of the board was through the first zone and most of the way through the second zone and the burners for those two zones had been shut down by Vergoth.

19. At about 3:00 a.m., Vergoth was making an inspection of the kiln. To that point, it had been a "good night" in that Vergoth had not observed any sparks or fire of any sort in the kiln. He then reached the second inspection window in the second zone. When he opened it to look inside he felt a warm breeze blowing out of the kiln. That is not the normal situation. With a zone running normally with exhaust fans operating, there is normally a vacuum and the flow of air is into the kill through small openings such as an inspection window. When the zone is down, there is normally little air flow in or out of an inspection window.

20. When the breeze first hit Vergoth in the face, he got some sawdust or other debris in his eyes and took a step back. The air escaping out of the inspection window rapidly increased in velocity, pressure and temperature, which sounded to Vergoth like a jet engine. As air flow continued to increase, the large doors on the side of the kiln began blowing open; one to Vergoth's left and the rest to his right and down the line. In total, six doors on the front side and four doors on the backside of the kiln were blown open. Vergoth heard a large boom when the first door blew open and subsequently heard several "booms" coming from above and down the line. It is possible that the subsequent "booms" were caused by the expansion of ceiling material above the open doors on the backside being heated by the heat flowing out of those open doors.

21. The large doors that constitute the sides of the kiln have hinges on one side and latches on the other. The latching mechanism consists of a vertical shaft that is rotated by a handle about three feet long. There are three collars mounted on the shaft that have crescent-shaped hooks sticking out. These hooks slide into brackets on the adjoining door jamb. Rotating the shaft with the handle tightens the door against the jamb and the handle is locked into a catch that prevents it from opening. The collars are secured to the shaft by set screws about 5/16 inch in diameter. It is possible to twist the collars on the

shaft and this sometimes occurs when the hooks on the collars don't properly line with the brackets on the door jamb, but it takes considerable force on the three-foot handle to twist the collars on the shaft. When the doors blew open on April 28, 1992, all of the collars on those doors had been twisted on the shaft by the force that blew the doors open. All of the handles on those doors were still in the latched position. All of those doors had to be repaired by removing the set screws, rotating the collars to the proper position and tightening the set screws so that the doors would close properly. T. 208.

22. The explosion that blew open the doors did not blow off the lay-in panels on the roof of the kiln. They were not disturbed. The purpose of the lay-in panels is to allow the release of sudden pressure in the kiln without blowing open the doors, which could injure any nearby employee. That function failed. However, all the machinery and the Zone 3 burner shut down automatically.

23. Shortly after the doors blew open, heavy black smoke began billowing out of the kiln. After the smoke started billowing out of the kiln, Vergoth observed that there was a fire in the kiln. The fire was located mostly at the beginning of the third zone and extended for some distance back into the second zone. Because of the heavy smoke, Vergoth put on an air pack and then started fighting the fire. He was joined by Larry Reese, the team leader, who had been in the office when he heard the explosion. They used the fire hoses and operated the deluge system. A number of the automatic sprinkler heads went off; 13 had to be replaced later that day. Michael Anderson had come in at 3:00 a.m. to relieve Vergoth and the alarms were going off when he came into the locker room. As he was changing his clothes, smoke started coming in through the vents so he quickly finished dressing and ran to the kiln to help fight the fire. As he arrived, he heard another explosion, the smoke was very heavy and he started fighting the fire in the area of the second zone. T. 161-162. Larry Golnick, who had previously been a kiln inspector at Bildrite, was one of the three millwrights who had been called in to work on the pumps. He heard two or three big bangs and saw the smoke rolling out of the kiln. He went over to the kiln to see what had happened and then helped fight the fire for awhile. He evacuated the building when the smoke became so thick he thought he might be overcome. T. 174-176. Vergoth continued to fight the fire for some time. After a few minutes his first air pack ran out of oxygen and he had to switch to another. It took perhaps 15 minutes to knock down the main fire and some additional time to make sure that everything was out. Having been relieved by Anderson, Vergoth went home.

24. Lawrence Olafson was working as a trimmer at the dry end of the kiln at the time of the explosion. He had worked at Bildrite for six years and at Boise for 33 1/2 years before that. He heard three booms in succession and decided to get out of the area. He observed smoke coming out of the kiln, but decided to leave after the second explosion because he had never heard more than one explosion of that sort before and didn't know what was about to happen. He ran to the other side of the plant building

behind a wall. T. 151-159. Peter Larson was working as a machine tender. He was in the maintenance shop area getting oil at the time of the explosion. He heard one explosion or a loud noise followed by a lot of black smoke and then several pops. T. 182. He observed that a few of the doors on the kiln were open. He went up on the roof to see if anything was burning there. He saw nothing unusual. He came back down, saw that the building was filling with smoke and that there seemed to be enough people fighting the fire, so he left the building. T. 182-183.

25. Fires of the magnitude and with the explosive force of the one that occurred at 3:00 a.m. on April 28, 1992, at Bildrite are quite rare. Vergoth had never observed anything of that magnitude and neither had most of the younger employees. Several of the older supervisory employees testified that they had observed fires of that magnitude, particularly at Boise. Team leader Reese, who had been at Bildrite for six years and at Boise for 22 years prior to that, had never observed a fire that had blown open kiln doors. T. 408. Plant manager Tureene had seen a significant number of other fires where doors had come open, but generally felt that that was due to the doors not being latched firmly or otherwise defective. Tureene Deposition at 56-57. On the other hand, there were old employees such as Olafson with 33 years of experience at Boise who had never previously observed the multiple loud explosive booms that he heard.

26. Before Vergoth left, he and Reese had some discussion about what had happened. Vergoth told Reese that the doors blew open and kept asking Reese what had happened. T. 411. Reese told him he didn't know for sure, that he didn't know if it was caused by leaving the heat on too long as the board was being emptied out, or if there was dirt in the kiln. He did not know what happened and did not ever find out. T. 415.

27. The night crew began the cleanup and repair of the damage caused by the fire and that work continued onto the day crew. It was standard practice at Bildrite after fires to repair whatever damage there was and get back in production. Specific causes for fires are seldom identified and there is no particular effort made to do so. Bildrite at the time had no engineers on staff to make such an analysis. It is the practice to accept that fires happen and that when they do, damages are repaired, systems are checked out to the extent possible and the kiln is started up again.

28. In this case, it took about 19 hours to make all the repairs and check out all the systems. Bent rolls, broken chains and bent side irons holding the rolls had to be repaired and replaced, 40 sheets of damaged fiberboard had to be removed, the door latches on the doors blown open had to be readjusted, the ceiling material that had fallen had to be cleaned up, 13 sprinkler heads had to be replaced and the burner control systems had to be checked out.

29. John Arnold was the master electrician at Bildrite at the time. He and his assistant Kenneth MacKenzie, the apprentice electrician, had the responsibility of checking out the Blue Chip

system. Arnold and MacKenzie worked their normal 7:00 a.m. to 3:30 p.m. shift on April 28, 1992. When they arrived, the kiln was down and they became aware that there had been a fire. As part of their regular practice after a fire, they checked over the burner controls as well as the Blue Chip systems that controlled the burners. Arnold and MacKenzie checked over the parts of the burner control system that can be checked while the system is down. They found nothing abnormal in the electrical system. T. 254. Dale Krueger, the production superintendent at Bildrite, asked Arnold to check for any natural gas leaks. Bildrite has gas detection equipment available, but Arnold was not aware of it and it was not used. Neither he nor MacKenzie, nor anyone else for that matter, smelled any natural gas that day. However, MacKenzie noted there are times that you can normally smell gas that he believes comes from the normal combustion air if the ignition does not light. T. 255. Arnold visually checked the exterior of the main gas valve and saw no damage. Arnold found no unusual problems in the electrical systems and informed Krueger of that. He did not tell them that the kiln was safe to relight because he did not know that to be the case and that required expertise he did not have. When Vergoth returned to work on his 3:00 p.m. shift, he asked Arnold whether it was safe to start the kiln and Arnold told him that he did not know because all he could check out were the electrical parts. T. 59-60, 438-441.

30. Vergoth worked on cleanup and repairs during his shift. During the shift there had been considerable discussion about relighting the kiln among Vergoth and Normal Gorze, the team leader that evening, as well as other persons. At 6:50 p.m., Gorze called Krueger to report "trouble with crew," which Krueger recalls as Gorze reporting that Vergoth was concerned about starting up the kiln. Ex. 8, T. 311-312.

31. By about 10:00 p.m., April 28, 1992, Gorze, in consultation with Krueger, felt that the kiln was ready to relight. The repairs to the kiln's mechanical parts described above had been completed, the door latches had been readjusted, the electrical systems had been checked out and the area had been cleaned up. No experts had been called in to check the operation and safety of the kiln, but Bildrite management felt the kiln was in regular operating condition and that it was necessary to start producing product.

32. Gorze told Vergoth to start the kiln. He told Vergoth that the kiln was safe and that Arnold had inspected the kiln and said it was safe. Vergoth told Gorze that Arnold had told him that he didn't know whether the kiln was safe or not. Vergoth asked Gorze to have the kiln inspected by someone who was qualified to do so. He told Gorze that they had never found out why the flame in the Zone 1 burner had been burning bad for so many months and that now nobody could explain why they had just had the biggest explosion that Vergoth and employees with 20 years at Bildrite and Boise had ever seen.

33. Vergoth decided that it would be unsafe for him to relight the kiln because he did not believe the problem causing the explosion had been checked out properly, believed that the

problem could still exist, knew that he would be standing on top of the kiln with his arm wrapped around a pipe lighting the ignition, and knew they were down to a skeleton crew that would make it difficult to fight a fire if there was one, especially since the air packs had not been refilled. T. 60.

34. Vergoth informed Gorze that he would not relight the kiln and asked that he be assigned to do another job. Gorze told him he had none available and sent Vergoth home.

35. Gorze called in another kiln inspector, Ken Domitrovich, to light the kiln. Domitrovich had been a kiln inspector for about two years at the time. He didn't want to start the kiln because he did not know what had caused the explosion the night before, but told the supervisor that he would light the kiln, and he did so. T. 420, 426. Larson, the machine tender who had been present during the explosion the night before, was working again when Domitrovich relit the kiln about 11:45 p.m. Larson was concerned for his safety when the kiln was relit and went outside while the kiln was being restarted. T. 183. David Beck, who was a millwright who had been working on the pumps during the day, was called back in the evening. Ex. 8. He was present when Gorze asked Vergoth to relight the kiln and Vergoth refused. T. 220-222. He left the building at the time Domitrovich was relighting the kiln because he wasn't sure about what had actually happened and wanted to get out of there. T. 233.

36. On April 29, 1992, Vergoth reported for work. He was sent to the office to meet with Tureene and given an opportunity to explain why he refused to light the kiln. He did so and was informed that he was suspended until further notice. By letter of April 30, 1992, Tureene notified Vergoth that his refusal to relight the kiln was insubordination or disobedience and that he was being discharged effective that day. Ex. 3.

37. Vergoth was still making $8.35 per hour at the time of his discharge. Ex. 4. On his last paycheck, which covered the pay period from April 20, 1992 to April 30, 1992, his termination date, Vergoth had worked 60 hours of straight time and one hour of overtime. Vergoth was working full time plus some overtime. T. 75. The extent of the overtime is unclear, when they were working seven-day swings he got about two days every three weeks; when they were working five-day swings, there wasn't much overtime. Vergoth's year-to-date pay through April 30, 1992, including 30 hours of vacation and eight hours of holiday that he was paid on his final check, was $4,664.67. Ex. 4.

38. Vergoth received unemployment compensation of $4,332.00 during 1992. For the remainder of 1992, Vergoth worked at Bowman Properties earning total wages of $2,293.82 in 1992 and $7,223.50 through October 25, 1993. In 1992, he also worked for David Jay Construction and was paid $1,800.00. He has also been working at Fingerhut Corporation since June 1993, averaging about 15 hours per week and earning a total of $1,090.47 through October 24, 1993.

39. Following his discharge, Vergoth incurred certain expenses

in seeking replacement employment and in the cost of changing residences so that he could work. Those were $50.00 for lease preparation, $13.70 in postage and stationery for job resum e s and $79.00 in travel expenses. He also incurred $30.00 in telephone bills and $4.00 in fax charges in communicating with the Minnesota OSHA Division and the Attorney General's Office in connection with his discrimination charge.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has jurisdiction in this matter pursuant to Minn. Stat. 182.669, subd. 1.

2. Minn. Stat. 182.654, subd. 11, provides in relevant part:

> Subd. 11. An employee acting in good faith has the right to refuse to work under conditions which the employee reasonably believes present an imminent danger of death or serious physical harm to the employee.
>
> . . .
>
> An employer may not discriminate against an employee for a good faith refusal to perform assigned tasks if the employee has requested that the employer correct the hazardous conditions but the conditions remain uncorrected. . . .

3. Minn. R. 5210.0240 provides, in relevant part:

> Subpart 1. Potentially unsafe conditions. Unless provided by parts 5210.0200 to 5210.0340 there is no right granted by the act for employees to leave the job because of potentially unsafe conditions at the workplace. Initially an employer should be notified of hazardous conditions. If corrections are not accomplished or if a dispute arises about the existence of a hazard, the employee or authorized employee representative may request an occupational safety and health inspection of the workplace by giving notice to the commissioner of the hazardous condition.
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> Subpart 2. Hazardous condition. If an employee has a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition in the workplace, an employee acting in good faith may refuse to work if there is no reasonable alternative. The condition must be so hazardous that a reasonable person would conclude that there is a real danger of death or serious

injury and that there is insufficient time to eliminate the danger through enforcement procedures. The employee must, where possible, request the employer to correct the hazardous condition. An employer may not discharge or discipline an employee who refuses to perform assigned tasks under these conditions . . . .

This rule adopted under the Minnesota Occupational Safety and Health Act parallels 29 C.F.R. 1977.12(b), which was adopted under the Federal Occupational Safety and Health Act.

4. Minn. Stat. 182.669, subd. 1, provides:

> 182.669 DISCRIMINATION.
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> Subdivision 1. Any employee believed to have been discharged or otherwise discriminated against by any person because such employee has exercised any right authorized under the provisions of sections 182.65 to 182.674, may, within 30 days after such alleged discrimination occurs, file a complaint with the commissioner alleging the discriminatory act. Upon receipt of such complaint, the commissioner shall cause

> such investigation to be made as the commissioner deems appropriate. If upon such investigation the commissioner determines that a discriminatory act was committed against an employee, the commissioner shall refer the matter to the office of administrative hearings for a hearing before an administrative law judge pursuant to the provisions of chapter 14. In all cases where the administrative law judge finds that an employee has been discharged or otherwise discriminated against by any person because the employee has exercised any right authorized under sections 182.65 to 182.674, the administrative law judge may order payment to the employee of back pay and compensatory damages. The administrative law judge may also order rehiring of the employee; reinstatement of the employee's former position, fringe benefits, and seniority rights; and other appropriate relief. In addition, the administrative law judge may order payment to the commissioner or to the employee of costs, disbursements, witness fees, and attorney fees. Interest shall accrue on, and be added to, the unpaid balance of an administrative law judge's order from the date the order is signed by the administrative law judge until it is paid, at the annual rate provided in section 549.09, subdivision 1, paragraph (c). An employee may bring a private action in the district court for relief under this section.

5. Vergoth's refusal to light the kiln at Bildrite at approximately 10:00 p.m. on April 28, 1992, as directed by his supervisor, was done in good faith and upon his reasonable belief that doing so presented an imminent danger of death or serious physical harm to himself.

Vergoth's belief was reasonable. So far as he knew, there had never been an explosion like the one that had occurred in the early morning hours of that day at any time in anyone's memory. No one had ever seen an explosion blow open the doors of the kiln. Employees with over 30 years of experience in working on fiberboard kilns had never seen anything like it. Nobody could explain the cause of such an unprecedented event. He had to stand on top of the kiln to light the pilot light. He was reasonably worried that the explosion had been caused by natural gas. He had been aware of the "sloppy flame" on the Zone 1 burner which may have indicated incomplete combustion. He had been aware of overrides on the control system that included sensors on the movement of panels used in the pre-ignition purge of unburned natural gas. Moreover, the reason the kiln inspector had to push a switch on top of the kiln was that when the gas valve to the pilot flame was opened, it failed to trip the switch indicating that it was open. In other words, there was gas flowing to the pilot flame for some period of time before the kiln operator climbed up on top of the kiln and pushed the switch allowing the pilot light to be ignited. Depending on how long that took, there could have been a fair accumulation of natural gas before the pilot was ignited. Moreover, no one from Bildrite had ever done an adequate job of training the kiln inspectors as to the operation of the kiln and its safety features so that they

could adequately understand that the systems, if working, would prevent a gas explosion from occurring. Vergoth's fear of death or serious physical harm was very reasonable under the conditions.

Vergoth's actions were reasonable and indicated his good faith. He may well have been a problem employee for Bildrite because of his safety concerns and union activities, but he was not taking advantage of the situation in this case just to make a point. He had spent several hours talking with Gorze about the conditions and asking for explanations and requesting inspections by qualified persons to ensure that the kiln was safe. He did not walk off the job, he asked to be assigned to a different task. It was Bildrite that did not act in good faith. It, through its supervisory and managerial personnel, determined that the kiln was as safe as it ever was and directed Vergoth to start the burners. They didn't have anybody on staff qualified to determine the cause of the explosion and they didn't call anybody in. They relied on their years of experience in working with kilns and many kiln fires to simply say that all we do is clean up and start it up again. But they did so out of habit and not knowledge. Vergoth recognized that and realized that he was the one most exposed to the danger as he stood atop the kiln igniting the pilot light or later walking next to large doors that might blow open at any time.

6. The action of Bildrite, Krueger, Gorze and Tureene in directing Vergoth to light the kiln in spite of reasonable safety concerns and discharging him because of his refusal to do so was illegal discrimination against Vergoth under Minn. Stat. 182.654, subd. 11, and 182.669, subd. 1.

7. Vergoth is entitled to be reinstated in his position with all benefits and rights he would have had had he not been discharged on April 30, 1992. Vergoth is entitled to back pay in the amount of the difference between what he would have earned from the date of his discharge to the date of reinstatement less the amounts he earned from other employers during that time and less unemployment compensation received during that period. Pawelk v. Camden Township, 415 N.W.2d 47 (Minn. App. 1987). In this case, it unclear how much Vergoth would have made at Bildrite subsequent to April 28, 1992. While his rate of pay was known as of that date, his year-to-date pay indicates that he worked substantially less than regular full time up to that point and it is unknown what raises he could have expected during the period following April 28, 1992. He had already worked for a year at the same wage rate. The parties should be allowed to submit additional affidavits regarding Vergoth's wage history and projected earnings. Vergoth is also entitled to interest on such payments calculated from the time each payment was due.

8. Vergoth is entitled to compensatory damages for mental anguish in the amount of $5,000.00. Bildrite failed to take Vergoth seriously. Even though Vergoth was a "difficult" employee for Bildrite, many of the concerns he was raising were legitimate and all of his concerns regarding the explosion and safety issues in relighting the kiln on April 28, 1992, were very

reasonable. Instead, Bildrite accused him of twisting the facts so that he could make a unilateral refusal and then firing him for it. The stress and mental anguish of being discharged wrongfully and of attempting to support himself and his children thereafter were significant.

9. Vergoth and Complainant are entitled to costs, disbursements, witness fees and attorney's fees.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

1. Respondents International Bildrite, Inc., Dale Krueger, Norman Groze and Albert Tureene illegally discriminated against Rudolph Vergoth in violation of Minn. Stat. 182.654, subd. 11, and 182.669, subd. 1, when they ordered Vergoth to light the Bildrite kiln on April 28, 1992, and then discharged him for his good-faith refusal to do so.

2. Bildrite shall reinstate Vergoth to the position of kiln inspector with such pay, fringe benefits, seniority rights and other benefits he would have had had he not been discharged. Bildrite shall pay Vergoth back pay in the amount he would have earned had he not been discharged from April 28, 1992, until he is reinstated, less amounts received by Vergoth from employment and unemployment compensation during that period, together with interest at the rate provided by Minn. Stat. 549.09, from the date such payments were due. The parties shall submit affidavits to the Administrative Law Judge within 30 days regarding Vergoth's projected earnings during that period.

3. Bildrite shall pay Vergoth $142.70 compensatory damages for job search and relocation costs, together with interest thereon at the annual rate provided in Minn. Stat. 549.09, subd. 1(c), from July 1, 1992.

4. Bildrite shall pay Vergoth $5,000.00 as compensatory damages for mental anguish.

5. Bildrite shall expunge Vergoth's personnel records of any adverse references to Vergoth's termination of April 30, 1992, and shall not provide any negative references regarding that matter in response to any inquiries about Vergoth by prospective employers at any future time.

6. Bildrite shall pay Vergoth's and Complainants' costs, disbursements, witness fees and attorney's fees. Complainant shall submit a proposed accounting of such items within 30 days.

Dated this 4th day of January, 1994.

/s/

STEVE M. MIHALCHICK
Administrative Law Judge

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